

JAN 17 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAUL MARTINEZ-MARTINEZ,

Defendant - Appellant.

No. 04-10125

D.C. No. CR-03-00206-RLH/PAL

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted January 9, 2006^{**}

Before: HUG, O'SCANNLAIN and SILVERMAN, Circuit Judges.

Raul Martinez-Martinez appeals the sentence imposed following his guilty plea to unlawful reentry of a deported alien in violation of 8 U.S.C. § 1326.

Martinez-Martinez contends that his sentence in excess of two years, based on a

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentencing enhancement under 8 U.S.C. § 1326(b)(2) for a prior aggravated felony conviction, is illegal and violated due process under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As Martinez-Martinez acknowledges, his contention has been rejected by this court. *See United States v. Pacheco-Zepeda*, 234 F.3d 411 (9th Cir. 2000).

Because Martinez-Martinez was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the district court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error).

REMANDED.